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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 378

JOHN H. HESSEY, FRANK HARPER,
and OLIN R. HIGGINS,
Constituting the
PUBLIC SERVICE COMMISSION OF MARYLAND,
and
MAYOR AND CITY COUNCIL OF BALTIMORE,
a municipal corporation,
Petitioners,

vs.

THE BALTIMORE TRANSIT COMPANY,
and
THE BALTIMORE COACH COMPANY,
bodies corporate,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

CHARLES D. HARRIS,
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Public Service Commission
of Maryland,

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Assistant City Solicitor,
For Mayor and City Council
of Baltimore,
Petitioners.

The Daily Record Co., Baltimore 3, Md.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

TO THE HONORABLE, THE JUSTICES OF
THE SUPREME COURT OF THE UNITED STATES:

The Petitioners, John H. Hessey, Frank Harper, and Olin R. Higgins, constituting the Public Service Commission of Maryland, and Mayor and City Council of Baltimore, a municipal corporation, pray that a Writ of Certiorari may issue to review the final decision of the Court of Appeals of Maryland in the following matter:

I. SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

This petition is filed pursuant to the provisions of the United States Code Annotated, Revised Title 28, Section 1257(3).

A Writ of Certiorari is sought to review the final decision of the Court of Appeals of Maryland, which is the highest court of the State of Maryland, entered on July 27, 1950, in the case of *The Baltimore Transit Company and The Baltimore Coach Company, bodies corporate, Appellants, vs. John H. Hessey, Frank Harper, and Olin R. Higgins, constituting the Public Service Commission of Maryland, and Mayor and City Council of Baltimore, a municipal corporation, Appellees,* designated as Case No. 51 of the October Term, 1950, of the Court of Appeals of Maryland.

For brevity and convenience, the Petitioners, John H. Hessey, Frank Harper, and Olin R. Higgins, constituting the Public Service Commission of Maryland, will be referred to herein as "Public Service Commission" or "Commission"; the Petitioners, Mayor and City Council of Baltimore, will be referred to as "Baltimore City"; and the Respondents, the Baltimore Transit Company and the Baltimore Coach Company, will be referred to as "Company". The Petitioners' joint appendix references will be designated as "P. App." and the Respondents' appendix will be designated as "R. App.". References to the Opinion of the Court of Appeals of Maryland will be designated as "R.".

The Commission is the authorized State regulatory agency of the State of Maryland, for the regulation of public utilities. As such, it is authorized and empowered by statute to assume jurisdiction of and to determine the rates to be charged by street railroads, and to have "general supervision" over the control and operation of such utilities.

Baltimore City is the legal entity of the City of Baltimore. The Company is a street railway and bus system, and provides mass public transportation for the City of Baltimore and its environs.

The principal point involved in this case can be stated in relatively simple language. This is not the usual "rate case". No question of fair value, rate base, or rate of return is involved. In this case, a public transit system, "a particularly ailing unit of a generally sick industry, * * * whose investment is already impaired by economic forces, and whose earning possibilities are already invaded by competition from other forms of transportation,"* sought to increase its operating income by raising its basic adult fare from 12½ to 15 cents, with other comparatively minor changes in its fare structure. The Public Service Commission was convinced that a flat, inflexible fare increase would provide only a "temporary respite", at best, and rejected *this one method* of increasing operating income. Simultaneously, it invited the Company to consider and to submit "other proposals for changes in or modifications of the fare structure."

Does the Public Service Commission of Maryland have the power and authority to reject the *sole method* of financial relief proposed by the Company, and to suggest that the Company submit other proposals, without violating the 14th Amendment to the Constitution of the United States?

FACTUAL BACKGROUND OF THE CASE

Prior to January 1, 1949, the Company's basic fare, for 19 years, had been 10 cents. This fare had been established on February 6, 1930, as the result of the decision of the Supreme Court of the United States in the case of *United Railways and Electric Company v. West, et al.*, 280 U. S.

* Quotation from *Market St. Ry. Co. v. Railroad Commission of California*, 324 U. S. 548, 89 L. ed. 1171 (page 24 of this Petition).

234. The result of that increase in fare was an almost immediate and drastic loss in the Company's revenues and earnings, finally culminating in receivership on January 5, 1933.

On June 7, 1948, the Company applied to the Commission for a 12½-cent fare by token or 15 cents cash. After extended hearings, the Public Service Commission, issued an order dated December 21, 1948, in which it authorized a 12½ cent basic fare by token or 13 cents cash, to take effect January 1, 1949.

The Commission's opinion in that case, referring to the fare increase, stated in part:

> "If this is permitted the Commission can insist that the service to the public be adequate to meet its needs and that the conditions now causing so many complaints by passengers be remedied."

Almost simultaneously with the 1949 fare increase to 12½ cents, the Company granted a wage increase to its operators from $1.35 to $1.45 per hour, and other groups of operating employees received corresponding increases. The Company's revenue and patronage immediately began to decline with the institution of the 12½-cent fare. In the face of these declining revenues and patronages, and admittedly in the knowledge "that the Company's earnings throughout the year 1949 had not been satisfactory", the Company again granted another wage increase from $1.45 to $1.55 per hour, in late December, 1949. On January 4, 1950 — the very day that the Company and its Union concluded their agreement for this second substantial wage increase within one year— the Company filed its application with the Public Service Commission to increase its basic fare from 12½ cents to 15 cents (P. App. 2). Its application cited, as justification for the proposed fare increase, (1) a decline in gross revenues

during the year 1949 of approximately $2,000,000, (2) the 1949 wage increase from $1.35 to $1.45 per hour, and (3) the additional impact of the 1950 wage increase from $1.45 to $1.55 per hour (P. App. 4).

During 1949 — the first full year of operation under the 12½-cent fare — the Company's combined expenses of operation continued to increase as both its service and its patronage continued to decrease. Its operating revenues of $24,486,140 were the highest of any post-war year, and only slightly less than the peak war years of 1943 and 1944. Although taxes of $2,122,079 were next to the lowest for any year since 1941, the combined operating expenses, depreciation, and taxes were the highest in history — $23,864,440 (R. App. 93). Yet the Company's service showed a net decrease of 3.10% during 1949 and progressively steeper decreases in service for the first three months of 1950 (P. App. 13). Patronage showed a decrease of 11.68% (P. App. 11), or a total loss of approximately 29,000,000 passengers during 1949. This 1949 loss of passengers constitutes 52% of the aggregate loss of 55,000,000 passengers since the peak year of operation in 1943: (See Commission's Opinion, R. App. 19, 20 and also P. App. 14).

On January 4, 1950, the Company filed an application with the Public Service Commission to increase its existing fare structure in the following manner (R. App. 12-13):

> "*First Single Zone — City or County:* A fare of fifteen cents for the conveyance of each passenger over twelve years of age, in lieu of the existing base rate fare of twelve and one-half cents, when fare tokens are purchased, or thirteen cents cash.
>
> *Multiple Zones:* Seven cents cash for each additional zone after the first zone fare has been paid in lieu of the existing fare of five cents for each additional zone.
>
> *Two-trip Slip:* Good for a round trip on Mondays to Fridays, inclusive, between the hours of 10:00 A. M.

and 3:00 P. M.; twenty-two cents (payable in advance)* for the round trip in lieu of the present arrangement under which there is issued on Mondays to Fridays, inclusive, between the hours of 10:00 A. M. and 4:00 P. M., upon the request of the passenger at the time the initial fare is paid, an identification slip which, when presented by the same passenger with the payment of a fare of five cents, entitles such passenger to a return ride in the first zone of such return trip, provided the return trip is started not later than 4:00 P. M., on the date of issuance of the slip.

School and Children's Fares: Children between the ages of four and twelve years and children attending school up to and including high school, seven cents in lieu of the existing fare of five cents."

The Company's application was opposed by the People's Counsel, by Baltimore City, as intervenor, and by various organizations and private individuals. Hearings were held and arguments heard, consuming six separate days.

During the hearing, the Company based its case principally on the testimony of four witnesses: John B. Banz, its Chief Auditor; Philip E. Askey, its General Personnel Manager; Henry E. Ehlers, Vice-President of Day and Zimmerman, Inc., a firm of public utility consultants and engineers; and R. G. Berryman, who is associated with that firm. A fifth witness, Harry J. Casey, General Traffic Manager for the Company, testified regarding complaints by the public against the Company's service.

Mr. Banz testified regarding the general financial condition of the Company, the trend of its operating revenues and expenses over a period of years, and the probable results of its operations under both the existing and the proposed fare structures. Mr. Banz testified, in essence, that the Company's 1949 operating income (profit) was $621,700

* Since the institution of the increased fares, following the decision of the Court of Appeals of Maryland, the Company has waived the requirement of payment in advance for the two-trip slip.

(P. App. 9); its 1950 operating loss under existing fares, including operating expenses as estimated and the 1950 wage increase, would be $1,828,300 (R. App. 101); and its 1950 operating income (profit) under the proposed fares for a full year, including the 1950 wage increase, would be $952,100 (R. App. 102). This last estimate, however, was predicated upon the accuracy of the Company's forecast regarding operating expenses and an assumption that Mr. Berryman's forecast of $25,020,000 passenger revenues, under the proposed fares, would be borne out by actual experience.

Mr. Askey's testimony was concerned only with an explanation of the wage increases granted by the Company to its operating employees. The testimony of Mr. Ehlers, the Company's third witness, brought down to date the Company's rate base as of December 31, 1949, which he estimated to be $30,554,000 (R. App. 115-116).

Mr. Berryman was the Company's principal expert witness regarding forecasts of future revenues and patronage, under both the existing and the proposed fare structures. He admitted that his previous estimates on behalf of the Company in the 1948 fare case, regarding the effect of the increase in fare from 10 to 12½ cents, were too optimistic. His figures showed the following effects of the 12½-cent fare during its first full year of operation in 1949, as contrasted with his 1948 estimates (R. App. 52):

(1) Percentage loss in traffic was .27% *greater* than the 1948 Berryman estimate.

(2) Percentage increase in average fare was 2.30% *less* than the 1948 Berryman estimate.

(3) The relationship of the percentage loss in traffic to the percentage increase in fare was .035% *greater* than the 1948 Berryman estimate.

(4) The percentage gain in revenue was 2.48% *less* than the 1948 Berryman estimate.

Thus, the 1948 Berryman estimates were not only erroneous; they erred on the Company's side *in every respect.*

Mr. Berryman further estimated that, if the traffic level continued to decline throughout 1950 at the same rate of decline experienced in the first months of 1950, passenger revenues would be $21,931,000 under existing fares, and 14.1% more, or $25,020,000 under the proposed fares (R. App. 55-56). As to patronage estimates, Mr. Berryman forecast, on cross examination, that traffic levels would drop to 183,000,000 passengers in the first year of operation under a 15 cent fare, representing a total loss of 33,000,000 passengers from the 1949 traffic level (P. App. 24).

Despite his advocacy of a 15 cent fare, Mr. Berryman admitted that he had "no way of knowing" whether such a proposed fare would solve the Company's financial problem with any degree of permanency (P. App. 25).

Edward A. Roberts, a nationally recognized expert on transit system matters, was the chief witness in opposition to the proposed fare increase. He had testified for the People's Counsel in the 1948 rate case. His impartiality is shown by his testimony, in that case, that some increase in fares was necessary at that time. It was largely because of his testimony that the Commission granted the previous fare increase from 10 to 12½ cents. His qualifications were readily admitted by the Company in the pending case (P. App. 26).

Mr. Roberts' testimony can be summarized as follows:

> (1) The Company can and should initiate further operating economies, principally by the curtailment of unprofitable service to small suburban centers, where the traffic produces an average revenue of only 20 cents per bus mile, while the Company's average cost of bus operation is 45 cents per bus mile (P. App. 50).

(2) The Company's estimates of revenues and expenses under the proposed 15 cent fare are again too optimistic (P. App. 45-48).

(3) The Company's patronage, under a 15 cent fare, would decline to 179,000,000 in the first full year of operation. This would represent a loss of 37,000,000 passengers from the 1949 total patronage. 16,800,000 passengers included in the new patronage loss would stop using the Company's service solely because of an increase in fare from 12½ cents to 15 cents (P. App. 14, 36-37).

(4) In the face of the Company's constantly declining patronage, the four major taxicab companies in Baltimore City have substantially *increased* their patronage during the past three years, with no fare increases (P. App. 15, 38-39).

(5) The Company's service to the public has constantly declined since June, 1949, until in March, 1950, 10.58% fewer miles were operated than in March, 1949. If the same trend continues, the Company will further decrease its service by operating approximately 4,000,000 fewer miles in 1950 (P. App. 13, 34).

(6) The proposed 15 cent fare will not solve the Company's financial problem, for two principal reasons:

(a) If the prevailing economic trend continues, the Company would need further relief in 1951 under a 15 cent fare, even without the impact of the additional patronage loss due to the fare increase;

(b) Such a flat, across-the-board fare increase would be harmful to both the Company and the community, losing for the Company the profitable short-haul passengers and retaining the unprofitable long-haul passengers (P. App. 53-54).

(7) Such a fare increase would create serious community problems such as an increase in street congestion, greater pressure on parking facilities, and a reduction in the number of persons who travel to the central business district to do business (P. App. 54, 57).

(8) The proposed fare increase would still leave the Company in an unsatisfactory financial condition (P. App. 57).

(9) "In view of these virtually certain results of a 15-cent fare, it sems highly desirable for the Company to consider alternative fare structures and to offer alternative fare plans rather than to limit the choice between continuance of the present fare structure or establishment of a fare structure which will by no means solve the Company's financial problem and which will definitely create a serious community problem" (P. App. 57).

In addition to Mr. Roberts, a considerable number of independent public witnesses voluntarily testified in opposition to the proposed fare increase. As of the date of final argument before the Commission, 305 individuals had written letters to the Commission regarding the proposed fare increase, of which 251 opposed and 54 favored the Company's application. Also recorded in opposition to the proposal were 14 petitions signed by 1,484 persons, and 40 different organizations.

On May 25, 1950, the Commission denied the Company's application for the specific fare changes required, but "without prejudice to the right of the said companies to apply to the Commission for a reopening of this proceeding upon the submission to the Commission by the said companies of other proposals for changes in or modifications of the fare structure of the said companies" (R. App. 35).

The Company immediately filed an appeal, on May 26, 1950, to the Circuit Court No. 2 of Baltimore City. Because of the importance of the case to Baltimore public, the Commission waived its statutory rights under the provisions of Article 23, Section 415 of the Maryland Code of Public General Laws, for extended time in which to answer the Bill of Complaint and to set the case down for a hearing. A demurrer was filed by the Commission on May 31, 1950. Baltimore City intervened as a co-defendant, and filed an answer on June 1, 1950. Briefs were filed and the case was argued in the lower court before Judge Emory H. Niles on June 6, 1950. On June 12, 1950, Judge Niles sustained the action of the Public Service Commission, in a written opinion (R. App. 1), and signed a final order to that effect the following day (R. App. 11). On June 14, 1950, the Company filed an appeal to the Court of Appeals of Maryland.

The case was advanced for argument on the docket of the Court of Appeals of Maryland, and was argued July 18, 1950. The opinion of that Court, reversing the lower Court and the Commission, was entered on July 27, 1950 (R. 58-65).

II. JURISDICTIONAL STATEMENT

The specific ground for the assumption of jurisdiction in this case by the Supreme Court of the United States is the interpretation placed by the Court of Appeals of Maryland upon the 14th Amendment to the Constitution of the United States, as that interpretation applies to the particular facts of this case.

The Company based its appeal, from the Circuit Court No. 2 of Baltimore City to the Court of Appeals of Maryland, upon the question of confiscation by the Commission of the Company's property. It argued, in its brief, that (1) the Commission's order "results in confiscation of the

Transit Company's property"; (2) "the Commission cannot lawfully require the Transit Company to continue rendering service at confiscatory rates in lieu of the proposed just and reasonable rates"; and (3) "there is no substantial evidence in the record of the proceedings before the Commission to support the challenged order". Thus, it can be seen that the Company's argument was based upon the contended violation by the Commission of the 14th Amendment to the Constitution of the United States.

Even a precursory reading of the opinion of the Court of Appeals in this case leaves no doubt that the 14th Amendment was its legal foundation. Although the opinion does not specifically mention the 14th Amendment, the so-called confiscatory nature of the Commission's order is referred to continuously, and forms the entire basis for the Court of Appeals' decision. The following excerpts from the opinion amply support this statement:

> "The appellees do not contend that the order was interlocutory, but argue nevertheless that the rejection of the applicants' proposal cannot be deemed confiscatory, since it left the door open for future proposals." (R. 58-59).
>
> "The Commission argues, however, that it acted within its powers in rejecting the proposal because it invited alternate proposals looking towards an increase in fares. But the result was to continue in effect the confiscatory rates, without any present relief." (R. 60).
>
> "Having found the present rates to be confiscatory, if the proposed increases were unacceptable, it was incumbent upon the Commission to adopt an adequate substitute, or to grant temporary relief pending its final determination. *Cf. Dayton Power & Light Co. v. P. U. C.*, 292 U. S. 290, 294." (R. 61).
>
> "The present rate is admittedly confiscatory and hence unlawful." (R. 64).

The Petitioners take exception to the statement, in the last quoted excerpt of the opinion, that the present rate is "admittedly confiscatory". In the Commission's brief filed with the Court of Appeals of Maryland, it admitted that "the present fares would be confiscatory if the Commission either approved them as a permanent fare basis, or rejected any reasonable method of financial relief proposed by the Company". The Petitioners did *not* admit that the continuance of the present rate amounted to confiscation, pending the submission by the Company of an alternative fare structure.

The Petitioners submit, therefore, that a Federal question was presented for decision to the highest State Court in Maryland having jurisdiction over the parties, the decision on this Federal question was necessary to the determination of the case, (it was the *only* issue discussed in the State Court's opinion), and no non-Federal question was even considered by the State Court.

Should there be any possible doubt regarding the jurisdiction of the Supreme Court of the United States in this case, due to the omission of any specific reference in the State Court's opinion to the Constitution of the United States or any Federal statute, such doubt must be construed in the light of previous statements by this Court, in similar circumstances considered in the following cases.

The Supreme Court of the United States "cannot refuse jurisdiction because the state court might have based its decision, consistently with the record upon an independent and adequate non-federal ground * * * this Court may examine the opinion of the state court to ascertain whether a federal question was raised and decided, and whether the Court rested its judgment on an adequate non-federal ground". *Indiana ex rel. Anderson v. Brand*, 303 U. S. 95, 98, 99; 82 L. Ed. 685, 690.

Even though the opinion of the State Court *can* be based upon a non-Federal ground, if it is not a substantial or sufficient one, "it will be presumed that the State Court based its judgment on the law raising the Federal question", and the Supreme Court will then assume jurisdiction. *Williams v. Kaiser,* 323 U. S. 471, 478; 89 L. Ed. 398, 403.

If the basis for the State Court's decision is obscure, or doubtful, the Supreme Court of the United States, in the exercise of its appellate jurisdiction, "has the power not only to correct errors of law in the judgment under review *but also to make such disposition of the case as justice requires.*" (Italics supplied). *Minnesota v. National Tea Co.,* 309 U. S. 551, 555; 84 L. Ed. 920, 923.

The Petitioners submit that the Opinion of the Court of Appeals of Maryland in this case was clearly based upon the contended violation by the Commission of the 14th Amendment, as was argued by the Company in its appeal to that Court. The decision of the Court of Appeals was based *entirely* upon the question of confiscation. If there should be any doubt regarding the jurisdiction of the Supreme Court of the United States, however, there is still ample justification for this Court to hold that— at the very least—the Federal question was the motivating and major factor supporting the decision.

III. QUESTIONS PRESENTED

The questions presented for review, by this petition for a Writ of Certiorari, are as follows:

(1) Has the Public Service Commission, which is vested with the statutory power to approve or reject rate schedules proposed by the Respondents, violated the 14th Amendment to the Constitution of the United States, and "confiscated" the Respondents' property, merely because the Commission rejected without prejudice the *one method* proposed by the Respondents to

obtain financial relief, if that rejection necessarily results in the Respondents continuing to operate temporarily at a loss or at less than a reasonable rate of return pending the submission by them of alternative fare proposals?

(2) Does the 14th Amendment to the Constitution of the United States necessarily require that the Respondents must be granted a temporary non-confiscatory rate of return, or similar financial relief, pending a submission by them, upon the Commission's invitation, of alternative plans for financial relief to the Commission?

In considering these questions, it should be remembered that the Company was and is amply fortified with large reserve funds accumulated during its profitable war years, for possible readjustments and contingencies which admittedly do not now exist. These unused reserve funds total $4,851,914 (R. App. 32-33).

The Court of Appeals of Maryland, in reversing the Decree of the Circuit Court No. 2 of Baltimore City and the order of the Commission, in effect answered both of these questions in the affirmative.

The Petitioners submit that such a finding is in error.

IV. REASONS FOR GRANTING WRIT OF CERTIORARI

1. It is submitted that the Court of Appeals of Maryland has decided a Federal question of substance, in this case, not heretofore *specifically* determined by the Supreme Court of the United States.

To the knowledge of these Petitioners, the principal question propounded by the circumstances of this case have yet to be considered by this Court. These specific circumstances arise from a situation where a State regulatory

body has dismissed the *one method* of financial relief proposed by a utility, and yet, recognizing the need by that utility of some form of financial relief, has continued the present rates in existence pending a further study and a further submission of other proposals. The Petitioners cannot find a case previously decided by this Court upon such a factual situation, adjudged in the light of the 14th Amendment to the Constitution of the United States.

2. The Petitioners also submit, however, that the interpretation placed upon the 14th Amendment in this case by the Court of Appeals of Maryland is *generally* not in accord with any previous decisions of the Supreme Court of the United States on this constitutional question.

In discussing this argument, it is necessary for the Petitioners to (a) summarize the statutory powers of the Public Service Commission, as authorized by the Maryland Legislature; (b) discuss the dual obligation imposed upon the Commission to consider both the value of the service to the public and the financial return to the Company; and with that background, (c) discuss the interpretation placed upon the 14th Amendment by the Court of Appeals of Maryland in this case, and its holding that the Commission's order amounted to confiscation.

(a) The Statutory Powers of the Public Service Commission of Maryland.

The Maryland statutes confer broad powers of "general supervision" by the Public Service Commission over street railroads. Under the provisions of The Maryland Code of Public General Laws, Article 23, Sections 349, 368, 371, 378, 381 and 382, the Commission's powers extend not only to the regulation of rates which the Commission "shall determine" to be "just and reasonable" (particularly Sections 381 and 382). These powers extend also to the control

and operation of a street railroad's "service and facilities", which "shall be safe and adequate and in all respects just and reasonable" (Section 368), and "the adequacy, security, and accommodation afforded" by such service (Sections 368 and 378). It has the power to determine when practices and service are "unjust, unreasonable, unsafe, unreasonably improper or inadequate", and to issue proper orders with respect thereto (Section 381).

A strong legislative intent, unmistakable in its true meaning, is shown by the enactment of the "catch-all" or "safety" statutes concerning the jurisdiction and powers of the Public Service Commission. These statutes constitute the last sentence of Section 349 and all of Section 425, which read as follows:

Section 349:

* * * * * *

> "And to such other and further extent, and to all such other and additional matters and things, and in such further respects as may herein appear, either expressly or impliedly."

Section 425:

> "The public service commission hereby created shall have, in addition to the powers herein specified, mentioned or indicated, all additional, implied and incidental powers, which may be proper and necessary to effectually carry out, perform and execute all the said powers herein specified, mentioned or indicated."

There seems to be no doubt that, in addition to the explicit conferring of broad jurisdictional powers in the main body of the Public Service Commission law, these extensive "catch-all" powers in Sections 349 and 425 were intended by the Maryland Legislature to give wide latitude to the Public Service Commission, to cover, for example, just such a case as we have here—a power to reject one proposal of a public utility without prejudice to that utility's right to submit an alternative proposal which, in the Commission's judgment, would best serve both the utility and the public.

The case of *Crisfield v. Public Service Commission*, 183 Md. 179, involved, among other issues, the right of the Commission to go beyond the express powers conferred upon it by statute. In that case, the Commission was required to determine, among its findings, whether a particular utility had a perpetual franchise to render electric service in Crisfield. Although this determination involved a mixed question of law and fact, the Court held that it was the Commission's "plain duty, as well as its jurisdictional right, to make such a determination," under the provisions of Section 425 of Article 23. In commenting upon this section, the Court said, at page 188:

> "This is a direct and explicit statement of the legislative intent to confer on the Commission full jurisdiction to completely execute the powers and duties delegated to it by the statute.
>
> "The test of the validity of its orders is always their reasonableness and lawfulness. The denial to it of jurisdiction to ascertain the basis of a reasonable or lawful order would be to give a construction to the Public Service Commission Law which would paralyze its operations in a case like the one at bar and thus thwart the legislative intent so plainly expressed."

The authority of the Public Service Commission to deny a particular form of application to serve transit needs, and to grant that privilege to another applicant, is set forth in the case of *Hartman, et al. v. Public Service Commission*, 179 Md. 285. The language used by the Court of Appeals in that case has been quoted with approval by the same Court in the recent case of *Bosley v. Quigley*, 189 Md. 493, at pages 511-512, as follows:

> "Reference has heretofore been made to the allegations of the amended bill of complaint, and in their consideration this Court must not be unmindful that we have no power to substitute our judgment for

the judgment of the Commission, whose orders are *prima facie* correct, and to which body the Legislature had intrusted the duty and discretion of hearing and passing upon the permit under consideration. *This task necessarily involves a consideration of many elements, such as advisability, practicability, public necessity, convenience and benefit to the public as a whole.* To justify us in holding the amended bill of complaint good as against demurrer, its allegation must clearly and satisfactorily allege facts from which it would follow that the order was unreasonable, and in this case it cannot, in our judgment, be held that the amended bill of complaint meets the necessary requirements. After all, its allegations seem to be no more than to set forth that at the hearing before the Commission, appellants and the Baltimore Transit Company both had applications to serve certain territory by passenger motor bus lines, and that the Commission, notwithstanding appellants' witnesses felt and testified that their permit should be granted, denied a permit to appellants, but did grant one to the Baltimore Transit Company. But necessarily the Commission had to refuse one or both permits and *the mere fact that appellants' witnesses honestly felt that their plan was feasible would not bind the Commission to its acceptance,* nor would it follow because the Commission refused the permit that its action was unreasonable, arbitrary or unjust. See *Public Service Commission v. Byron,* 153 Md. 464, 138 A. 404; *Public Service Commission v. Williams,* 167 Md. 316, 329, 173 A. 259; An Article of Reuben Oppenheimer, Esquire, on 'Administrative Law in Maryland', Maryland Law Review, April, 1938, Vol. 2, No. 3; *Howard Sports Daily v. Public Service Commission,* 179 Md. 355, 18 A. 2d 210, and authorities there cited" (Italics supplied in opinion).

(b) The Public Service Commission Has A Dual Legal Obligation to Consider Both the Value of the Service to the Public and the Financial Return to the Company.

It is obvious that, in this case, we have a situation radically different from the usual "rate case." There is no question of fair value, or rate base, or rate of return. It is solely a question of how to best provide the necessary financial relief, considering the dual obligation of the Commission to authorize a rate "that will be reasonable to the user of the utility and commensurate with the service rendered, and, on the other hand, will produce a fair and reasonable return upon the property or capital invested in the public service enterprise."

This dual obligation upon the Commission is succinctly stated by the Court of Appeals of Maryland in the case of *Miles v. Public Service Commission,* 151 Md. 337, at 339:

> "It can be generally stated that the purpose of the Legislature in enacting the Public Service Commission statute was to provide for the creation of a commission *with the power and duty of supervision and control* over the corporations and individuals engaged in the operation of public utilities within the state. The Commission has the power and authority to require safe and adequate service to the public and to fix such rates as, on the one hand *will be reasonable to the user of the utility and commensurate with the service rendered,* and, on the other hand, will produce a fair and reasonable return upon the property or capital invested in the public service enterprise." (Italics supplied).

A recent case in point is *City of Pittsburgh v. Public Utility Commission,* 165 Pa. Sup. Ct. 519, 69 A. 2d 844, decided by the Superior Court of Pennsylvania on November 15, 1949.

The Pittsburgh Railways Company filed tariffs with the Pennsylvania Public Utility Commission to increase its basic street car fare from 10 to 12½ cents, and the fare for through bus service from 12½ cents to 15 cents. The City of Pittsburgh instituted a complaint against the proposed increased fares. The Commission suspended the proposed fares pending a hearing, and on June 15, 1949, found that the proposed rates did not produce an excessive return. The complaint of the City of Pittsburgh was dismissed, whereupon it appealed to the Superior Court of Pennsylvania. That court vacated the Commission's orders, and remanded the case for further action consistent with its opinion, stating, in part:

> "The property of a public utility is still private property, but it is property devoted to the public service and impressed with a public interest. *United Railways & Electric Co. of Baltimore v. West*, 280 U. S. 234, 50 S. Ct. 123, 74 L. Ed. 390. A public utility occupies a quasi public or quasi trustee position; and the rates to be paid by the public for the service rendered, which are intended to produce a fair return on the fair value of the used and useful property of a utility, must bear a relationship to the obligations which flow from such public status."

(c) There Has Been No Confiscation of Property Because the Conventional Rules of Confiscation Do Not Apply in this Case. There Has Been No Denial of Financial Relief, as Such; There Has Been A Denial of Only the One Form of Financial Relief Proposed.

"Confiscation," in the ordinary legal meaning of that word, does not apply in this case. Confiscation is a relative, rather than an absolute term; and is so described in the case of *Public Service Commission v. United Railways & Electric Co.*, 155 Md. 572; (Cert. denied, U. S. Supreme Court, 278 U. S. 568, 73 L. Ed. 510), at pages 584 and 596:

> "Confiscation, in that sense, is essentially a relative, and not an absolute term, and it does not exist apart from the facts which are said to occasion it. No fixed or general rule can be announced by which it can be determined whether it exists in any given case, because whether it exists or not must be determined from factors which vary with the facts of each case, since rate cases, like wills, seldom have 'twin brothers'. . . .
>
> "Whether a given rate is burdensome to the public, involves the question of the value of the service, and presents an extremely difficult and troublesome question, the answer to which, except in extreme cases, *can only rest in the judgment of the commission, operating upon varying factors,* each of which is entitled to some weight, but no one of which ordinarily is controlling." (Italics supplied.)

The Company based its appeal entirely upon "confiscation" in its barest sense, ignoring completely the "varying factors" which overshadow that term as used alone, unconnected with such important factors as service and a huge prospective loss of patronage. The Company's property has not been "confiscated" merely because the Commission has said "try again, and let us help you by some other method." The intent of the Commission's opinion and order was merely to hold the rates in abeyance until a more satisfactory rate structure, which would aid the Company and still not unduly penalize the "short-haul" passengers, could be found. For reasons best known to itself, however, the Company declined the Commission's invitation to present an alternative plan.

One of the principal cases relied upon by the Commission in this case is *Market Street Railway Company v. Railroad Commission of State of California,* 324 U. S. 548, 89 L. Ed. 1171 (1945). The Market Street Railway Com-

pany "operated a system of passenger transportation by street car and by bus in San Francisco and its environs." The Railroad Commission instituted an investigation on its own motion into the rates and service of the company. As a result, it ordered the company's basic fare reduced from 7 cents to 6 cents. This order was affirmed by the Supreme Court of California (24 Cal. 2d 378, 150 P. 2d 196).

The company took an appeal to the Supreme Court of the United States, claiming that the Commission's order deprived it "of its property without due process of law, contrary to the Fourteenth Amendment."

The opinion in that case, written by Mr. Justice Jackson, closely parallels the reasoning of the Court of Appeals of Maryland in *Public Service Commission v. United Railways & Electric Company,* supra, "that no fixed or general rule can be announced by which it can be determined" that confiscation "exists in any given case." The following statements from the opinion in the *Market Street Railway Company* case amount to a recent and highly judicial affirmation by the Supreme Court of the United States of the views of the Court of Appeals of Maryland, as expressed in *Public Service Commission v. United Railways & Electric Company,* supra. These excerpts from the opinion are particularly applicable to this case:

> "The appellant in support of its contentions that it has been denied due process in procedure and has been subjected to an unconstitutional taking of its property invokes many decisions of this Court in which statements have been made that seem to support its contentions. But it should be noted at the outset that most of our cases deal with utilities which had earning opportunities, and public regulation curtailed

earnings otherwise possible. But if there were no public regulation at all, this appellant would be a particularly ailing unit of a generally sick industry. The problem of reconciling the patron's needs and the investors' rights in an enterprise that has passed its zenith of opportunity and usefulness, whose investment already is impaired by economic forces, and whose earning possibilities are already invaded by competition from other forms of transportation, is quite a different problem. . . .

"Certainly the due process clause of the Constitution is not violated when a commission takes into consideration practical results to the public of advances which it has allowed in rates. To the extent that the Commission was influenced by considerations of the value of the service in this case, we find nothing that denies the Company any rights possessed under the Federal Constitution. . . .

"It is idle to discuss holdings of cases or to distinquish quotations in decisions of this or other courts which have dealt with utilities whose economic situation would yield a permanent profit, denied or limited only by public regulation. While the Company does not assert that it would be economically practicable to obtain a return on its investment, it strongly contends that the order is confiscatory by the tests of *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 603, 605, 88 L. Ed. 33, 345, 346, 64 S. Ct. 281, from which it claims to be entitled to a return 'sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital' and to 'enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed'. Those considerations, advanced in that case (which was reviewed pursuant to statute rather than under the Fourteenth Amendment), concerned a company which had advantage of an economic position which promised to yield what was held to be an excessive return on its

investment and on its securities. They obviously are inapplicable to a company whose financial integrity already is hopelessly undermined, which could not attract capital on any possible rate, and where investors recognize as lost a part of what they have put in. . . .

"We have considered appellant's complaints in considerable detail because the case in so many ways departs from the usual rate case. We find no constitutional infirmity in the result or in the procedure by which it is reached. The judgment of the Supreme Court of California is therefore affirmed."

The case of *Schwabacher v. U. S.*, 334 U. S. 182, 92 L. Ed. 1305 (1948) involved a suit by two minority stockholders in opposition to the merger of two railroad companies. It is cited here to show the judicial recognition by the courts that public regulation need not necessarily guarantee public profits or restoration of economic values. In this case, the Supreme Court of the United States stated the rule, at page 199 as follows:

"Public regulation is not obliged and we cannot lightly assume it is intended to restore economic values, even if promised by charter terms, if they have already been lost through the operation of economic forces."

This case refers to the *Market Street Railway Company* case with approval. The *Schwabacher* case is also quoted with approval in the case of *Auburn Savings Bank v. Portland Railroad Company*, decided by the Supreme Judicial Court of Maine on February 28, 1949, 65 A. 2d 17, 31.

In the case of *Federal Power Commission v. Natural Gas Pipe Line Company*, 315 U. S. 575, 86 L. Ed. 1037 (1942), there are two precepts stated which are particularly applicable to the instant case, to the effect that (1) rate making agencies are not bound to use any single formula

or any combination of formulas in fixing rates, but that a Commission's order must be reviewed by the court "as applied to the facts before it"; and (2) regulation does not assure net revenues. The opinion deals with these two precepts in the following manner, at pages 586 and 590:

> "The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end. . . .
>
> "But regulation does not insure that the business shall produce net revenues, nor does the Constitution require that the losses of the business in one year shall be restored from future earnings by the device of capitalizing the losses and adding them to the rate base on which a fair return and depreciation allowance is to be earned. *Galveston Electric Co. v. Galveston,* 258 U. S. 388, 66 L. Ed. 678, 42 S. Ct. 351; *San Diego Land & Town Co. v. Jasper,* 189 U. S. 439, 446, 447, 47 L. Ed. 892, 896, 23 S. Ct. 571."

These statements are quoted with approval in another leading rate making case, *Federal Power Commission v. Hope Natural Gas Company,* 320 U. S. 591, 88 L. Ed. 333, 344, 345.

We submit, on the basis of these cases decided by the Supreme Court of the United States, that this case must be considered as an individual situation, and judged on its individual merits. Conventional rules of fair return

do not apply. It is not a question of trying to effect a complete cure by mathematically computing the amount of revenue needed. The problem is to keep the Company in operation by any reasonable means. This calls for a fare structure that will yield the Company more revenue and yet not drive away millions of passengers. Even the Company's expert witness concedes that a 15 cent fare will result in a loss of 14,000,000 additional passengers in the first year of operation under such a fare (P. App. 23-24). That, in the Petitioners' opinion, is not rendering *public service*. It is not fulfilling the Commission's obligation to require service "reasonable to the user."

Furthermore, there has been no refusal to recognize the Company's need for financial relief. Nor has there been a final rejection of its request for that relief. On the contrary, the need for financial relief in some form has been recognized—certainly by the strongest implication. Seldom, if ever, has the Public Service Commission expressed a stronger invitation for the Company to present an alternative plan for relief. Its opinion (R. App. 34) tells the Company that:

> "A more comprehensive fare structure should be developed. . . . The Commission will give its prompt and careful attention to any other proposals which the Company may care to offer."

The Commission's order reinforces this invitation to the Company to present another method of financial relief by dismissing the Company's application "without prejudice to the right of the said companies to apply to the Commission for a reopening of this proceeding upon the submission to the Commission by the said companies of other proposals for changes in or modifications of the fare structure of the said companies" (R. App. 35).

Until the Court of Appeals of Maryland rendered its decision in this case, there was never any doubt that the Commission is not only authorized to consider and determine the matters relating to valuation of utility property and the rate of return to be allowed thereon, but also to consider and determine the *form* of rate relief most likely to produce the return to which the utility is legally entitled.

It is true that in most rate cases the subject of rate structure has been overshadowed by the more formidable questions of rate bases and rates of return. This is understandable in those cases where it is necessary only to decide the amount of increase or decrease in rate necessary to produce a fair and reasonable return on the utility's property. But where, as here, a substantial doubt exists as to the *effectiveness* of the fare schedule proposed, and there are other types of schedules radically different in form which could be employed to the advantage of both the utility and its passengers, then the question of fare structure becomes of vital importance and requires serious consideration before a final determination is made.

These were the circumstances with which the Commission was faced in the present case. The failure of the Company to produce studies of other forms of fare embracing such possibilities as zone systems, charges for transfers, and weekly passes, or even to demonstrate to the Commission that these possibilities had been investigated and considered by the Company, was one of the principal reasons assigned by the Commission in support of its order.

The Court of Appeals of Maryland, in substance, has adhered to the proposition that any relief is better than none, and held the Commission's order to be "confiscatory" because the existing rates thereby continued in effect were confiscatory. It is obvious in this case, however, that *the*

Company itself voluntarily continued to render service at what it calls confiscatory rates, declining the Commission's invitation to submit alternative proposals for financial relief. If there is any "violation of the 14th Amendment", *the Company has elected to bring about that situation.* It has assumed *per se* that its proposed rates are "just and reasonable" merely because they would temporarily increase the Company's total operating revenues. The many other "varying factors" which altogether make just and reasonable rates have been relegated to oblivion.

Finally, it is submitted that the action of the Court of Appeals of Maryland in this case may have an unforeseen and chaotic effect upon utility regulation in other States which may be confronted with a similar problem. This decision has shackled the Public Service Commission of Maryland, an important State regulatory agency, in the exercise of the very power for which it was created. If this decision is not reversed, public utility regulation, not only in Maryland but very probably in every other State, will lose its effectiveness. No matter how ill-advised may be any applicant's proposed form of financial relief, this Commission will be forced to accept it, providing *only* that the applicant can prove it needs financial relief.

It is submitted, therefore, that the interpretation placed by the Court of Appeals of Maryland upon the 14th Amendment to the Constitution of the United States, in this case, is misguided, labored, and erroneous, and not in accord with applicable decisions of the Supreme Court of the United States.

WHEREFORE, the Petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of the Supreme Court of the United States, directed to the Court of Appeals of Maryland, commanding that Court to certify

and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket as No. 51, October Term, 1950, *The Baltimore Transit Company and The Baltimore Coach Company, bodies corporate, Appellants, vs. John H. Hessey, Frank Harper, and Olin R. Higgins, Constituting the Public Service Commission of Maryland, and Mayor and City Council of Baltimore, a Municipal Corporation, Appellees;* that the said judgment of the Court of Appeals of Maryland may be reversed by this Honorable Court, and that your Petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

AND your Petitioners will ever pray.

CHARLES D. HARRIS,
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Public Service Commission
of Maryland,

PHILIP H. DORSEY, JR.,
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THOMAS N. BIDDISON,
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JOHN J. GHINGHER, JR.,
Assistant City Solicitor,
For Mayor and City Council
of Baltimore,
Petitioners.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 378

JOHN H. HESSEY, FRANK HARPER,
AND OLIN R. HIGGINS,
CONSTITUTING THE
PUBLIC SERVICE COMMISSION OF MARYLAND
AND
MAYOR AND CITY COUNCIL OF BALTIMORE,
A MUNICIPAL CORPORATION,
Petitioners,

VS.

THE BALTIMORE TRANSIT COMPANY,
AND
THE BALTIMORE COACH COMPANY,
BODIES CORPORATE,
Respondents.

BRIEF OF THE BALTIMORE TRANSIT COMPANY AND THE BALTIMORE COACH COMPANY IN OPPOSITION

CLARENCE W. MILES,
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of Counsel.

The Daily Record Co., Baltimore 3, Md.

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OPINION BELOW

The opinion of the Court of Appeals of Maryland has not yet been reported officially. It may be found, however, in 75 A. 2d 76 (Adv. Shts. 1950). A certified copy of said opinion is appended to the transcript of record filed in this Court.

JURISDICTION

The jurisdiction of this Court is sought under United States Code Annotated, Title 28, Section 1257(3). The judgment of the Court of Appeals of Maryland sought to be reviewed was entered on July 27, 1950, in the case of *The Baltimore Transit Company and The Baltimore Coach Company, bodies corporate, Appellants, v. John H. Hessey, Frank Harper and Olin R. Higgins, constituting the Public Service Commission of Maryland and Mayor and City Council of Baltimore, a municipal corporation, Appellees.* For brevity the individual Petitioners constituting the Public Service Commission of Maryland will hereinafter be referred to as the "Commission" and, together with the Mayor and City Council of Baltimore, will be referred to as the "Petitioners". The Baltimore Transit Company and its wholly-owned subsidiary, The Baltimore Coach Company, will be hereinafter jointly referred to as the "Company" and the Court of Appeals of Maryland as the "State Court".

The Petitioners state that the specific ground for assumption of jurisdiction by this tribunal is the interpretation placed by the State Court upon the 14th Amendment to the United States Constitution despite the fact that nowhere in its opinion does that tribunal refer to the 14th Amendment or to any other provision of the Federal Constitution. On the contrary, the State Court rested its decision on a construction of the statutory powers of the Commission under the provisions of Sections 344 to 429, inclusive, of Article 23 of the Public General Laws of Maryland.

The Petitioners further state that this Court should not refuse jurisdiction because the State Court might have based its decision upon an independent and adequate non-Federal ground. They assert this Court should, neverthe-

less, examine the opinion of the State Court to ascertain whether a federal question was, in fact, raised and whether the latter Court reached its judgment on an adequate non-federal ground. The Petitioners further state that: "If the basis for the State Court's decision is obscure or doubtful, the Supreme Court of the United States, in the exercise of its appellate jurisdiction 'has the power not only to correct errors of law in the judgment under review but also to make such disposition of the case as justice requires'."

We earnestly submit that an examination of the State Court's opinion shows that it was construing the *statutory* duty of the Commission to determine the just and reasonable rates or fares to be charged by the Company, the Commission having found the then existing fares to be unreasonable. The decision of the State Court was based on an adequate non-federal ground and contains no finding or conclusion with respect to a federal question of substance not heretofore decided by this Court or decided in a way probably not in accord with applicable decisions of this Court.

QUESTIONS PRESENTED

The Petitioners at pages 14 and 15 of their Petition for the issuance of a writ of certiorari argue that the questions presented by their said Petition are (i) whether the action of the Commission in refusing the Company the rate relief it sought violated the Fourteenth Amendment of the Constitution of the United States and (ii) whether compliance with the Fourteenth Amendment of the Constitution of the United States made it mandatory upon the Commission to approve fares granting "a temporary non-confiscatory rate of return or similar financial relief, pending a submission * * * of alternative plans for financial relief to the Commission * * *."

Petitioners by the form of their questions, we respectfully submit, attempt to divert the attention of this Court from what are really the only two actual questions presented to it for determination, viz.:

(1) Has the State Court decided a federal question of substance not heretofore determined by this Court?

(2) Is the opinion of the State Court in accord with applicable decisions of this Court?

It is the position of the Respondents that the first of these two questions should be answered in the negative and the second in the affirmative. We shall show that the decision of the State Court is based upon its construction of the duties and powers of the Commission as provided by the laws of Maryland, and that the Commission's action in denying the rate relief sought by the Company was inimical to such statutory provisions. In short, we shall show that the Commission is without statutory authority to require the Company to continue the rendition of its public service at confiscatory rates or fares when the proposed fares (approved by the State Court) are just and reasonable as measured by the statutory yardstick. We shall further show that the conclusions of the State Court are in accord with the decisions of this Court.

STATEMENT OF FACTS

On January 4, 1950, the Company filed an application with the Commission for authority to increase its fares for the transportation of persons in Baltimore City and adjacent counties from a basic 13 cent fare (two tokens for 25 cents) to a basic 15 cent fare per passenger. Hearings before the Commission began on March 6, 1950 and were concluded on April 24, 1950. Five days, or parts thereof, were devoted to receiving testimony in evidence, the remainder of this period being consumed by recesses.

There were four principal witnesses presented on behalf of the Company. The testimony of John B. Banz, Chief Auditor of the Company, (all uncontradicted with respect to its accounting accuracy by any other witness in the proceedings) was that if the existing fares were to be continued throughout the year 1950 the Company's actual operating deficit, including adjustments for a recent wage increase, would exceed $1,800,000 (Company Exh. No. 18, App. p. 101). On the assumption, however, that the proposed fares had been in effect for the entire year 1950 and had yielded passenger revenues in the amount of $25,020,000 (as estimated by Mr. Berryman, another Company witness) and with annual operating expenses estimated in an amount regarded by the Company as the most likely to be incurred, the Company's operating income, or net revenue, would aggregate $952,100 (Company Exh. No. 19, App. p. 102).

There was no contradiction anywhere in the record of Mr. Banz's testimony to the effect that (a) the Company was operating on a basis whereby its annual loss would exceed $1,800,000 unless rate relief was accorded and (b) the proposed fares would produce operating income of less than $1,000,000 annually, approximately 3% on the minimum rate base as previously determined by the Commission.

Mr. Philip E. Askey, General Personnel Manager of the Company, testified solely with respect to the negotiations conducted by the management of the Company and its employees leading up to the recent increase in wages and the reasons which necessitated such increases. In substance, he pointed out that the increases were agreed to by the Company because the same were in line with those paid by the transit industry in other cities of comparable size and to employees of other industries in Baltimore employing labor of comparable skills (Company Exh. Nos. 20 to

25, inclusive, App. pp. 103-114). He furthermore made clear in his testimony that a refusal to agree upon the wage scale as adopted would have, in the opinion of the management of the Company, resulted in a strike with its attendant impact upon the City's welfare (App. pp. 43, 44). Nothing was developed on the cross-examination of Mr. Askey that could reasonably warrant any conclusion that the officers or directors of the Company had been improvident or guilty of any mismanagement in agreeing to the wage increases in question and not a single word was offered by any other witness challenging the propriety of the position of the Company with respect to such wage increases.

Mr. Henry E. Ehlers, Vice President of Day and Zimmerman, Inc., public utility engineers and consultants, found the rate base of the Company as of December 31, 1949, to be $30,554,000, a figure which was conceded to be accurate by the Commission (App. p. 18).*

The only Company witness about whose testimony there was any dispute was that of Mr. R. G. Berryman, associated with Day and Zimmerman, Inc. That controversy had to do with the amount of annual revenue which may be reasonably expected to result from the proposed fares.

The Company's estimates of passenger revenues under the proposed rates of fare were developed through Mr. Berryman by the use of a passenger loss ratio expressing the ratio between the per cent decrease in riding as a result of the increased fare and the per cent increase in fare. Such estimates were based upon the use of a passenger loss ratio of 0.29 derived from detailed studies of the actual effect of the fare increase of January 1, 1949. This effect was studied

* Mr. Ehlers merely brought to date by net additions at cost the rate base fixed by the Commission in Case No. 4930 decided by it on December 21, 1948, which authorized a fare increase effective January 1, 1949.

in five different approaches as reflected on Company Exh. No. 32 (App. p. 121), resulting in estimated percentages of passenger decrease ranging between 6.00% and 7.34%, averaging 6.78%. The passenger loss ratios corresponding with these decreases range between .252, .309 and average .285.

The results of this analysis indicated an actual passenger loss ratio only slightly higher than the 0.25 ratio which was used by the Company in its passenger estimates in Case No. 4930 resulting in the fare increase of January 1, 1949. The 0.25 ratio had been adopted as a result of detailed studies of prior fare increases and a full consideration of prevailing economic and competitive conditions in Baltimore, as well as experience elsewhere.

The reliableness of the Company's estimate of the effect of the 1949 fare increase was shown by the uncontradicted testimony of Mr. Berryman (App. p. 52) who compared the predicted and actual effects of the 1949 fare increase, as follows:

	Actual	*Previous Forecast*
Percentage loss in traffic	6.78%	6.51%
Percentage increase in average fare	23.76%	26.06%
The relationship of the percentage loss in traffic to the percentage increase in fare	.285	.25
Percentage gain in revenue	15.37%	17.85%

In the judgment of the Company's independent consultants and operating officials, the results of the 1949 fare increase represented a reliable indication of the probable effects of the proposed fare increase under economic and competitive conditions prevailing in Baltimore. Consequently, they developed their estimates on the basis of a 0.29 traffic loss ratio.

A different view of the appropriate passenger loss ratio was given by Mr. E. A. Roberts, a consultant in state railway and bus fare matters, who was retained to collaborate with People's Counsel.

Mr. Roberts testified (App. p. 82): "It is my opinion that if the transit fare in Baltimore were to be increased to 15 cents, the factor used by Mr. Berryman would be 0.40." This opinion, he stated, was based on general observations of the effect of post-war fare increases in other cities. He did not profess to have made any specific studies applicable to Baltimore (App. pp. 90, 91). Notwithstanding his failure to consider local factors directly affecting the specific case at bar, Mr. Roberts estimated a total of 179,000,000 revenue passengers in the year 1950 under the proposed rates of fare, reflecting a decrease of 8.60 per cent due to the proposed fare increase (People's Counsel Exh. No. 9, App. p. 129). A simple arithmetical computation shows that this would produce an increase in passenger revenue of 11.4% resulting from the fare increase. It is, therefore, a conceded fact that in Mr. Roberts' opinion the proposed tariff would produce an increase in revenue of 11.4% as compared with the 14.1% increase estimated by the Company in Exhibit No. 33 (column 12). The real controversy, therefore, was not whether the proposed fares would improve the Company's impoverished position but had to do merely with how much they would improve it.

Various studies were presented with respect to the effects of fare increases and of prevailing economic trends for the full year 1950 by both Mr. Berryman and Mr. Roberts. Based upon the Company's estimate of $25,020,000 passenger revenue (which Mr. Roberts calculates to be $24,415,600) for a full year under the proposed fares at the 1950 traffic level, plus other operating revenues of approximately $240,000, and less operating expenses, depreciation, and

taxes, the resulting increase in operating income would be $952,100, all as shown on Company Exh. No. 19 (App. p. 102). This increase would result in a return of 3.1% on the minimum rate base of the Company as determined by the Commission in the last rate proceedings involving the Company (Case No. 3940) brought to date, as was testified by Mr. Banz (App. p. 42).

Mr. Roberts testified that he had no specific proposal to suggest as an alternative to what he erroneously termed a flat 15 cent fare and frankly conceded that he had made no detailed study of any possible alternative (App. p. 91) fare structure. He advised the Company, however, to consider alternative fare structures of a character which would enable the Company to secure more passengers and greater revenues than under the proposed fares. Mr. Roberts obviously knew that the Company had considered numerous fare structures before proposing the one embodied in the application because counsel for the Transit Company on at least two occasions (App., see pp. 59-63) urged People's Counsel and the City of Baltimore to permit Mr. Roberts to sit down with representatives of the Transit Company and study the various other fare structures which it had considered and all of the data underlying the same. Such suggestion was made for the very purpose of affording Mr. Roberts an opportunity to review all of the relevant data and statistics and to give to the People's Counsel, the State of Maryland, the public and the Company the benefit of any suggestions he had to offer with respect to any feasible alternatives other than the proposed fares. People's Counsel and the General Counsel of the Commission, however, refused to agree to such a conference.

After testifying as to certain economies and additional revenues which he thought the Company might realize,

Mr. Roberts frankly admitted that, accepting all of his assumptions with respect to his suggested economies and revenues, the Transit Company's proposed fares would not produce excessive earnings (App. p. 87). At another point in his testimony, he admitted that "the flat increase in fare to 15 cents will not, even on the basis of the Company's own exhibits, produce any greater net earnings than 3 per cent of the Company's minimum rate base" (App. p. 88).

As is apparent from People's Counsel Exh. No. 9 (App. p. 129), Mr. Roberts estimated that 179,000,000 passengers would be transported annually by the Company under the proposed fares as contrasted to Mr. Berryman's estimate of 183,000,000 passengers. Mr. Roberts' estimate would produce $24,415,600 of annual passenger revenue, a figure which is obtained by multiplying his estimated number of passengers by the average rate of fare of 13.64 cents (Company Exh. No. 33, App. p. 124). The annual operating income which the Company would receive under Mr. Roberts' estimate would, therefore, be $510,000.

Thus on the minimum rate base as determined by the Commission in Case No. 4930 brought down to date in Company Exh. No. 26, the annual operating income the Company would receive under Mr. Roberts' estimate would be 1.7%.

From this undisputed evidence in the record it will be seen that the *only dispute in fact in this case is as to the amount of additional annual net revenue the proposed fares would produce — $952,100 in the opinion of the Company and $510,000 in the opinion of Mr. Roberts.*

In summary, the uncontradicted evidence was that (1) under the then existing fares the Company was operating at an annual loss of $1,800,000, (2) under the proposed fares the Company would earn not more than 3% on an undisputed

rate base (or 1.7% by Mr. Roberts' estimate) and (3) the proposed fares would convert an annual operating deficit of $1,800,000 into annual net revenue of $952,100 (or $510,000 by Mr. Roberts' estimate).

In the face of this evidence the Commission on May 25, 1950 denied the Company any relief and dismissed its application. The Commission added that the dismissal was "without prejudice to the submission of other proposals for changes in or modifications of the fare structures" notwithstanding the fact that the schedules proposed by the Company were non-discriminatory and followed the flat fare pattern which had been in existence in Baltimore for more than forty years and is in use in most of the metropolitan areas of the country.

The Company, which had submitted the proposed fare schedules only after an exhaustive consideration of other possible alternatives, declined to submit other proposals and promptly appealed to the Circuit Court No. 2 of Baltimore City. On June 13, 1950, that Court sustained a demurrer of the Commission and the City to the Company's Bill of Complaint. An immediate appeal was taken by the Company to the Court of Appeals of Maryland, which advanced the hearing of the case and on July 27, 1950, reversed the lower Court in a unanimous opinion.

ARGUMENT

I.

No Federal Question of Substance is Presented in this Case.

No questions as to rate base, rate of return, appropriate depreciation, or reasonableness of operating expenses are involved in this case. It is manifest that such questions could not be projected since it is undisputed that the then existing fares were resulting in an annual operating *deficit*

of $1,800,000. Nor was there any contention that the fares proposed by the Company would produce an excessive return. This question was not involved since the uncontradicted evidence was that the proposed fares would produce a maximum return of 3% by the Company's estimate and 1.7% by the estimate of the witness for People's Counsel.

All parties agree that the existing fares of the Company were confiscatory and that financial relief was necessary. In its brief filed with the State Court the Commission stated:

> "Certainly, the present fares would be confiscatory if the Commission either approved them as a permanent fare basis, or rejected any reasonable method of financial relief proposed by the company. There is no dispute on this point."

The Circuit Court No. 2 of Baltimore City which sustained the Demurrer of the Commission and the City to the Company's Complaint stated, in its opinion:

> "* * * The essential fact is that the Transit Company is now operating at a loss of approximately $1,700,000 per year upon the present basic fare of 12½ cents, and the Transit Company asserts that it is faced with bankruptcy unless the fare is raised to 15 cents" (App. pp. 2, 3).

From these conceded facts it is clear that this is not the usual rate case presented to this Court wherein it is contended that confiscation results because the regulatory body failed to find a proper rate base or to allow an adequate return or that it disallowed reasonable operating expenses. In this case the Commission found that the existing rates were confiscatory and that the Company was in dire need of financial relief. The relatively narrow question is thus projected: What was the duty of the Commission under

such circumstances and in the light of the Maryland law? If the Company had discharged its burden of proof and had submitted a reasonable rate schedule, was it not the obligation of the Commission (under its statutory duty to fix just and reasonable rates — Secs. 368 and 381, Art. 23 of the Maryland Code*) if it found the proposed rates were unacceptable, to adopt an adequate substitute or to grant temporary relief pending the final determination?

It is thus seen that the basic question presented is not a federal one but is one with respect to the appropriate procedure to be followed under a state statute. The State Court held that the Company had met its burden of proof and that: "Having found the present rates to be confiscatory, if the proposed increases were unacceptable, it was incumbent upon the Commission to adopt an adequate substitute or to grant temporary relief pending its final determination."

In a case directly in point, *Dayton Power & Light Co. v. P. U. C.*, 292 U. S. 290, 294, 78 L. Ed. 1266, 1272, the state commission adopted the view (as here) that it was required to either accept or reject the proposed rates in the very form submitted. This Court said:

> "The appellee argues that the only question for the Commission was one as to the reasonableness of the new schedule in the very form proposed; let the rates be excessive by ever so little, the schedule, it is said, was to be rejected altogether and no other could be substituted. In opposition the appellant urges that this is *too narrow a construction of the function and powers of the Commission under the applicable statute;* if the proposed schedule was too high and the earlier one too low, there was a duty to fix a rate between, and thereby make the compensation adequate. *We accept this broader view in the absence of a ruling to the contrary by the courts of the state.* * * *" (Italics supplied.)

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* The relevant provisions of Sections 368 and 381 of Article 23 are set forth in an Appendix attached hereto.

Here the Court of Appeals of Maryland has adopted the broader view and has held that when the utility has met the burden of proof in establishing its need for financial relief and has submitted a schedule of reasonable rates, the Commission has the duty to grant relief in *some form*, either by accepting the rates proposed, by adopting an adequate substitute or by granting temporary relief pending further study of other possible fare structures. It is submitted that, as this Court held in the *Dayton Power & Light* case, the construction by the State Court of the duty of the Commission under the Maryland statute should be accepted by this Court.

In argument before the State Court, the Commission took the position that the ordinary rules of "confiscation" had no application to this case but that the matter was one to be decided solely under a construction of the Maryland statutes (Secs. 349, 368, 371, 378, 381 and 382 of Art. 23 of the Maryland Code). The basic proposition argued by the Petitioner was that the only question presented was the narrow one of the right of the Commission, *under its statutory powers*, to reject the fares proposed by the Company and to require it to submit an alternative schedule of fares. Reference to the Commission's brief filed in that Court shows that the first section under its argument (p. 15) was captioned "(a) The Maryland Statutes Confer Such Power Upon the Public Service Commission", and its argument concludes with the statement (p. 27) "How then can the Company cry 'confiscation' when the dispute concerns only the *method* of providing financial relief?"

Indeed, even in their petition in this Court, the Petitioners argue at length that the Commission possessed such power under the Maryland statutes. Their principal argument begins on page 16 under the caption "(a) The Statutory Powers of the Public Service Commission of Maryland".

Great emphasis is placed on the "general supervisory" powers of the Commission (Sections 349, 368, 371, 378, 381, and 382 of Article 23), and the legislative intent purportedly shown in the "catch all" provisions of Sections 349 and 425. We submit that their very petition for Writ of Certiorari makes it clear that Petitioners' real complaint is with the State Court's construction of the Commission's power under those statutes.

In holding that the Commission had exceeded its statutory powers in this case, the State Court relied principally upon two of its own recent decisions, both of which dealt with a construction of the Commission's rate-making power under the Maryland statute. From the following excerpts it is clear that the Court's opinion in the instant case was disallowed upon a construction by it of the statutory law of Maryland, viz.:

> "The Commission possesses a wide discretion to approve or disapprove a particular rate schedule and its decisions are prima facie correct. But an order will be set aside if the Commission exceeds its jurisdiction or arbitrarily disregards the rights of the parties. *Hessey v. Capital Transit Co.*, ... Md. ....., 66 A. (2) 787, 789, and cases cited.
>
> "In that case we held that the Commission's refusal to permit the abandonment of an unprofitable line was unreasonable and arbitrary under the circumstances. In the earlier case of *Capital Transit Co. v. Bosley*, ... Md. ....., 62 A. (2) 267, 271, we held that an order rejecting an application for a general fare increase was unlawful, where the Company was losing money on its operations in Maryland, because conditioned upon the allowance of a 3-cent fare for school children, less than cost. It was said: 'We think it is impossible to justify the three-cent fare for school children and that the Commission's order is arbitrary, unsupported by substantial evidence and unlawful. The Commission's opinion demonstrates that the existing fares are unrea-

> sonable and the new fares are not more than reasonable. Yet its order purports to find that existing fares are reasonable *until* fares for school children are decreased and plaintiff's losses thus increased'. In both of these cases the fact that the Company was operating at a loss was the controlling factor which made denial of the relief sought unreasonable. * * * It is not shown that the proposed fare will yield an unreasonable return or that it will be ineffective to produce an operating profit at least for the current year. The present rate is admittedly confiscatory and hence unlawful. To defer relief pending a protracted further study is arbitrary and unreasonable."

This Court has repeatedly held that where the decision of the State Court deals with questions of state procedure, as is clearly evident in this case, no federal question is presented. *French v. Hopkins,* 124 U. S. 524, 31 L. Ed. 536; *Loeber v. Schroeder,* 149 U. S. 580, 37 L. Ed. 856. See also, *United Gas Public Service Co. v. Texas,* 303 U. S. 123, 139, 82 L. Ed. 702, 714-715, and *Bell Telephone Co. v. Pennsylvania P. U. C.,* 309 U. S. 30, 84 L. Ed. 563. And although the decision of the State Court might have been either upon a state ground or a federal ground, if the state ground is sufficient to sustain the judgment, this Court will not review it. *Williams v. Kaiser,* 323 U. S. 471, 89 L. Ed. 398.

From all that has been pointed out, we submit that the question presented in this case is basically one of the duty of the Commission under the applicable Maryland statutes to grant relief to a utility after it has found that relief must be granted if the utility is to survive. No question as to the necessity of the relief is presented. The sole question is as to the form of the relief, and the State Court has construed the Maryland statutes to require the Commission, under such circumstances, to affirmatively grant relief in some form. The question is one of procedure under the Maryland statutes creating the Commission which the Court of Ap-

peals decided against the Petitioners. We respectfully submit that no federal question is presented which would justify this Court in reviewing the judgment of the State Court.

II.

The Decision of the State Court is in Accord with the Applicable Decisions of this Court.

As has heretofore been pointed out, the existing prior rates of the Company were clearly confiscatory. The evidence is uncontradicted that they were causing an anuual operating deficit of $1,800,000. Actually there is no dispute on this point since the Commission admits the existing fares "would be confiscatory if the Commission either approved them as a permanent fare basis, or rejected any reasonable method of financial relief proposed by the Company." We know of no decision of this Court, which holds that a utility can be required, as a matter of law, to continue operating at a deficit. The holding of the State Court that "The present rate is admittedly confiscatory and hence unlawful" is clearly correct and really cannot properly be projected as an issue in this case.

The fares proposed by the Company and approved by the State Court did not produce excessive earnings. As we have pointed out, the evidence was that they would yield a maximum return of 3% by the Company's estimate and 1.7% by the Commission's estimate. Numerous Maryland decisions have held that a utility is entitled to a reasonable return on the fair value of its property as a matter of state statutory law.* *Public Service Commission v. Northern Central Ry. Co.*, 122 Md. 355; *Pennsylvania R. Co. v. P. S. C.*,

* In the instant case the *method* of arriving at a rate base is of no significance in view of the conceded facts that (i) the Company's previous fares were resulting in an annual operating deficit and (ii) those approved by the State Court will produce not more than 3% on an uncontested rate base.

126 Md. 59; *Havre de Grace Bridge Co. v. P. S. C.*, 132 Md. 16; *Miles v. P. S. C.*, 151 Md. 337; and the Commission itself has so held, *Re Baltimore Transit Co.*, 39 P. S. C. Md. Reps. 153 (1948). That the return produced by the proposed rates was less than that to which the Company is entitled at law is also clear from decisions of this Court. In *United Ry. & Elec. Co. v. West*, 280 U. S. 234, 74 L. Ed. 390, this Court held rates to be confiscatory which produced a return of 6.26% to the predecessor of the Company. So also this Court has held that a utility is entitled to a return which will permit it to pay operating expenses, attract capital and maintain its financial integrity. *Bluefield Water Works & Improvement Co. v. P. S. C.*, 262 U. S. 679, 692-95, 67 L. Ed. 1176; *Federal Power Comm. v. Hope Natural Gas Co.*, 320 U. S. 591, 88 L. Ed. 333. The conclusion of the State Court that "It is not shown that the proposed fare will yield an unreasonable return or that it will be ineffective to produce an operating profit at least for the current year", is thus in harmony with the decisions of this Court. We repeat, however, that this point is actually not in issue since the Commission does not contend that the proposed fares would yield an excessive return.

The result of the Commission's order dismissing the Company's application was to continue in effect the then existing confiscatory fares. This is so obvious as to hardly call for citation of authority. The cases are uniform in holding that an order denying permission to increase rates is necessarily a re-affirmance and re-prescription of the existing rates, and continues in force the confiscatory rates with no relief. In *Belt Line Railway Corp. v. Newton*, 273 Fed. 272, a three judge statutory court held that denial of relief from confiscation, even temporarily, by affirmative action or by non-action "prescribed a rate" by continuing in force the existing rate under an earlier order. The Court said:

"The action or non-action of the Public Service Commission has in effect continued and is now continuing in force the order of 1912."

On appeal, in *Banton v. Belt Line Railway Corporation*, 268 U. S. 413, 69 L. Ed. 1020, this Court said:

"Neither the original application nor the petition for rehearing relieved appellee of the burden of compliance with the order of October 29, 1912. * * * *The continued enforcement of that rate would operate to take appellee's property without just compensation, and to compel it to suffer daily confiscation. Notwithstanding the matter was pending on rehearing, appellee had the right to sue in the federal court to enjoin the enforcement of the rate. It was not bound to await final action by the Commission, and, if the rate was in fact confiscatory, to serve in the meantime without just compensation.* See *Pacific Teleph. & Teleg. Co. v. Kuykendall*, 265 U. S. 196, 204, 68 L. ed. 975, 980, 44 Sup. Ct. Rep. 553; *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, 293, 67 L. ed. 659, 662, 43 Sup. Ct. Rep. 353; *Love v. Atchison, T. & S. F. R. Co.*, 107 C. C. A. 403, 185 Fed. 326." (Italics ours).

See also *Prendergast v. New York Telephone Co.*, 262 U. S. 43, 67 L. ed. 853, and *West Ohio Gas Co. v. P. U. C.*, 294 U. S. 79, 79 L. Ed. 773 in which later case it was said: "Present confiscation is not atoned for by merely holding out the hope of a better life to come." Lower federal court holdings are to the same effect. *City of Dallas, et al v. Dallas Telephone Co.*, 272 Fed. 410; and *Augusta-Aiken Ry. & Elec. Corp. v. Railroad Comm.*, 281 Fed. 977. The State Court held that the result of the Commission's order was to continue in effect the existing admittedly confiscatory rates and that to deny relief pending a protracted further study was arbitrary and unreasonable. We submit that holding is in harmony with the decisions of this Court and hence is sound.

The rejection by the State Court of the Commission's proposal (App. pp. 32-33) that the Company meet its operating losses out of its reserves is patently in accord with the decisions of this Court. The State Court cited a holding of this tribunal as authority for its view, saying:

> "* * * The mandate that the Company meet operating deficit out of its reserves for deferred maintenance, depreciation and contingencies is patently inappropriate. 'The law does not require the company to give up for the benefit of future subscribers any part of its accumulations from past operations. Profits of the past cannot be used to sustain confiscatory rates for the future.' *Bd. of P. U. Com. v. New York Tel. Co.*, 271 U. S. 23, 32."

The Company's reserves for depreciation, deferred maintenance and contingencies were established from the collection of past fares approved by the Commission as just and reasonable. Clearly, the Commission's proposal that the Company hasten along the route to bankruptcy by exhausting these reserves in order to continue operating is invalid. The rule laid down in the *New York Telephone Case* has been followed many times and we are not aware that it has ever been overruled.

The holding of this Court in *Market Street Railway Company v. R. R. Comm. of Cal.*, 324 U. S. 548, 89 L. Ed. 1171, is not in conflict with the decision of the State Court. The petitioners attempt to picture the situation in that case as analogous, whereas, the facts are totally different. In that case, the carrier operated an antiquated property in San Francisco in direct competition with a municipally-owned street railway system. The type of transportation service rendered (including the operation of cable cars) was not only outmoded but was actually obsolete. It was established that the carrier could no longer earn any return at any fare possible of collection and hence should be scrapped.

Obviously, the Company is not in a similar situation. It does not operate an obsolete transportation system in competition with another and more efficient public carrier. On the contrary the great need for a continuation of the service of the Company is conceded by all parties and a major conversion program to buses was recently undertaken with the approval of the City of Baltimore and the Commission, 37 P. S. C. Md. Rep. 114. Moreover the undisputed evidence in the case shows that the Company can survive and operate at some profit if permitted to charge the proposed fares.* The opinion of the Court of Appeals clearly demonstrates that the holding of the *Market Street Railway* case is consistent with its decisions:

> "If it were established that the end was in sight and the Company moribund, then it might well be contended that since the Company had no value as a going concern, no rate base could be established, and the denial of a reasonable return on the investment would not be a violation of due process. That seems to have been the situation in *Market Street Railway Company v. Railroad Comm. of California*, 324 U. S. 548, relied on by the appellees, where the Court said: 'Apart from a little brief wartime prosperity, it seems doubtful whether any rate would yield appellant's operating expenses. Under these circumstances we do not find that anything has been taken from the appellant by the impact of public regulation. If the expectations of the Commission as to traffic increase were well founded, it would earn under this rate on the salvage value of its property, which is the only value it is shown to have. If expectations of increased traffic were unfounded, it could probably not earn a return from any rate that could be devised. We are unable to find that the order

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* Since the present fares became effective as the result of the decision of the State Court, the Company has been operating at a monthly profit whereas all prior months of the current year had shown deficits.

in this case is in violation of constitutional prohibitions, however unfortunate the plight of the appellant.'

"In *Capital Transit Co. v. Bosley*, supra, (p. 272), we refused to apply the 'moribund' principle to a utility merely because its proposed increase in fares would still be insufficient to yield any return on the value of the property. In the instant case the Company has not reached the point where there is no public need for its services. Indeed, it is carrying more passengers today than in any year prior to 1942, although there has been a decline in each year since the peak in 1943. The appellees argue that an increase in fare will accelerate this trend and offset the effect of the increase. They base their contention on the sharp drop in 1949, following the increase from a 10-cent to a 12½ cent base fare in January of that year. An analysis of the figures shows, however, that although the Company had an operating loss in 1948 of about $1,310,500, in 1949 their operating income was $621,700, despite the loss of passengers. The present operating loss in 1950, is due almost wholly to wage increases. Moreover, all of the witnesses agree that the proposed fare increase will turn the present operating loss into a profit, though they vary in their estimates as to the amount, the more optimistic estimates being those presented by the Company. We may assume that the Company is not obsessed with suicidal tendencies, but on the contrary is trying desperately to survive. To this end it has admittedly effected large economies in operation, though possibly at the cost of service rendered. In *Warren v. Fitzgerald*, 189 Md. 476, we discussed the history of the Company, and particularly its plan to abandon 46% of its trackage and substitute bus transportation to meet the threat of automobile competition. Mr. Roberts admitted that almost every suggestion he made in 1948, for improvements and economies in operation, had been adopted. Within the limits of reasonable regulation, it is fundamental that the solution of business problems rests squarely upon the shoulders of private management, not with the public authorities."

Finally, the Petitioners attempt to portray the State Court's decision as having a "chaotic effect" upon utility regulation and as "shackling the Commission in the exercise of the very power for which it was created." They assert that unless the decision is reversed all "public utility regulation, not only in Maryland but very probably in every other state, will lose its effectiveness." The absurdity of this distortion of the State Court's judgment is manifest from even the briefest reading of the Court's opinion. The Court did not hold that the Commission was bound to accept the schedules proposed by the Company. The Court said that if the proposed rates were unacceptable the Commission could adopt an adequate substitute or grant them on a temporary basis pending a final determination.* The decision was that where the Company has met the full burden of proof imposed by the statute and has submitted a schedule reasonable on its face (i.e. a schedule producing less than a reasonable return on the uncontested rate base) the Commission cannot arbitrarily dismiss its application but has a statutory duty to grant relief in some form. This broad view of the Commission's statutory function is in accord with the holding of this Court in *Dayton Power & Light Co. v. P. U. C., supra.* The State Court recognized that other alternative fare structures may be possible and the decision did not, of course, freeze the Commission to a permanent acceptance of the Company's proposal. The Court made this plain, in saying:

> "* * * In reversing the Commission's order, however, we express no opinion as to the extent to which the approval of the proposed schedule may be conditioned upon further study of a zone system, or any other work-

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* Following the decision of the State Court, the Commission through its General Counsel assented to the collection of the fares now in force.

able alternative, including improvement in service and the cultivation of good-will which the Commission stressed in its opinion."

It is difficult to find any "shackling" of the Commission in the State Court's opinion. A utility seeking rate relief still has the burden of establishing its need for the same. It still must come forward with a schedule of fares which are prima facie non-discriminatory and not calculated to produce excessive earnings. The regulatory process is not made less effective by the State Court's sound holding that when the utility has discharged this burden the Commission should affirmatively act. On the contrary, to adopt the Petitioners' view would strip the utility of any legal right to prompt Commission action and place it at the mercy of administrative caprice and protracted delays — delays that may sometimes be pitched upon political rather than sound administrative or regulatory considerations. We find no sanction in any of the holdings of this Court for such a view.

CONCLUSION

The writ of certiorari sought in this case should not issue because the Petitioners have not shown that the Court of Appeals of Maryland decided a federal question of substance not theretofore determined by this Court. Nor have they shown that the decision of the State Court is not in accord with the applicable decisions of this Court.

Respectfully submitted,

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APPENDIX

The relevant provisions of Section 368 of Article 23 of the Maryland Code are as follows:

> "* * * All charges made or demanded by any such common carrier for the transportation of passengers, freight or property, or for any service rendered or to be rendered in connection therewith, as defined in section 344, *shall be just and reasonable and not more than allowed by law or by order of the commission, conformably with the law.* Every unjust or unreasonable charge made or demanded for any such service or transportation of passengers, freight or property, or in connection therewith, or in excess of that allowed by law or by order of the commission, conformably with the law, is unlawful and prohibited." (Italics supplied.)

The relevant provisions of Section 381 of Article 23 of the Maryland Code are as follows:

> "Whenever the commission shall be of the opinion, after a hearing, upon its own motion or upon a complaint made as provided in this sub-title, that the rates, tolls, fares or charges demanded, extracted, charged or collected by *any common carrier*, railroad or street railroad, railroad corporation, street railroad corporation, or other corporation subject to the provisions of this sub-title, for the transportation of persons, freight or property within the State, or that the regulations or practices of such common carrier or corporation affecting such rates, tolls or services are unjust, unreasonable, unjustly discriminating or unduly preferential, or in anywise in violation of any provision of law, *the commission shall determine the just and reasonable rates, tolls, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed, and shall fix the same by order* to be served upon all common carriers or other corporations by whom such rates, fares and charges are thereafter to be observed. * * * (Italics supplied.)